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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CLEAR LIGHT VENTURES, INC. et al., Plaintiffs and Appellants, v. CITY OF PALO ALTO et al., Defendants and Respondents.	H043407, H044284 (Santa Clara County Super. Ct. No. 115CV278025,)

The City of Palo Alto (City) and its City Council approved the installation of a cell tower and an associated equipment shed (Project) by real party in interest Verizon Wireless (Verizon) on property owned by real party in interest Little League Baseball of Palo Alto, Inc. (Little League). Appellants Clear Light Ventures, Inc. and Parents & Neighbors Against Little League Celltower filed a petition for writ of mandate seeking to overturn the Project's approval, which the trial court denied. Appellants now appeal from that denial. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Project

On February 27, 2014, Verizon submitted a proposal to install a cell tower on a parcel of land owned by Little League located at 3672 Middlefield Road in the City. The parcel houses a little league baseball diamond and related structures, including a snack shack/office building, two dugouts, batting cages, bleachers, storage sheds, and four light poles to light the field at night. The existing light poles were 12 inches in

diameter and 60 feet tall. The parcel is zoned Single Family Residential (R-1) and designated "Single Family Residential" on the land use map in the City's general plan, also known as the Comprehensive Plan. It is bordered by Middlefield Road, the Mitchell Park library, a parking lot for Mitchell Park and the Covenant Presbyterian Church, and a fire station and electrical substation. Single family homes are located across Middlefield Road.

Verizon proposed replacing one of the existing light poles with a 65-foot tall pole that is 18 inches in diameter, on which three cellular antennas would be mounted. The antennas would be concealed within a cylindrical radome and field lights would be attached at the same height and orientation as on the other poles. Verizon further proposed housing associated equipment in a new enclosure to be located beside the existing storage sheds. Verizon requested Architectural Review and a Conditional Use Permit (CUP).

B. The City's Approval of the Project

The Architectural Review Board held a public hearing on the Project on September 18, 2014. Members of the public spoke for and against the Project at that time. After further hearing and discussion on October 16, 2014, the Architectural Review Board voted to recommend approval of the Project. The Architectural Review Board made findings in support of its recommendation, including that "[t]he design is consistent and compatible with applicable elements of the Palo Alto Comprehensive Plan." The Architectural Review Board set forth more detailed findings regarding the Project's compliance with the Comprehensive Plan in an attachment titled "Attachment C: Comprehensive Plan Table." Among other things, that attachment set forth a finding that the Project complied with Comprehensive Plan Policy L-12 to "[p]reserve the character of residential neighborhoods by encouraging new structures or remodel structures to be compatible with the neighborhood and adjacent structures" because (1) the cell tower "would not be incompatible with adjacent structures (particularly, the 60 foot tall light

poles)"; (2) "cell towers are necessary in one form or another within residential neighborhoods" to ensure adequate cell service; (3) "[t]here are already several existing cell tower facilities in close proximity to the project site within the neighborhood"; and (4) the proposed tower "would have a minimal visual impact to the neighborhood" given the existence of the other ball field lights and the fact that "[t]he addition of 5 feet in height for the new antennas is a very minor change."

On October 22, 2014, the City's Director of Planning and Community Environment (Director) approved the Project based on the Architectural Review Board's findings. The Director also approved a CUP. As required by Palo Alto Municipal Code (PAMC), section 18.76.010, subdivision (c)(1), the Director found that the Project will "not be detrimental or injurious to property or improvements in the vicinity, and will not be detrimental to the public health, safety, general welfare, or convenience." And, as required by PAMC, section 18.76.010, subdivision (c)(2), the Director found that the Project "will be located and conducted in a manner in accord with the Palo Alto Comprehensive Plan and the purposes of the Zoning Ordinance." In support of that finding, the Director noted that "Wireless Communication Facilities are allowed with Architectural Review and Conditional Use Permits as detailed in PAMC Section 18.42.110" and that "the proposal supports Comprehensive Plan Policy B-13 to support the development of advanced communication infrastructure and Policies L-7 and L-12 to evaluate changes in land use in the context of regional needs, overall City Welfare and objective as well as desires of neighbors and the preservation of neighborhood character. This proposal would serve the greater community by improving cell phone coverage in the area while also preserving the neighborhood character by having the least visual impact to the site and no impact to the current use of the property." City resident Charlene Liao appealed from the Director's decision on November 10, 2014.

The City's Planning and Transportation Commission held a public hearing regarding the CUP application on December 3, 2014. At the conclusion of that hearing,

the Planning and Transportation Commission voted to recommend that the City Council approve the CUP application.

On December 15, 2014, the City Council considered the CUP application and the appeal of the Director's approval of the Architectural Review Board application on its consent calendar. The City Council voted to approve the Project. The City Council found that "[t]he design is consistent and compatible with applicable elements of the Palo Alto Comprehensive Plan . . . as outlined in Attachment C[, the Comprehensive Plan Table]." More specifically, the City Council found that "the proposal supports Comprehensive Plan Policy B-13 to support the development of advanced communication infrastructure and Policies L-7 and L-12 to evaluate changes in land use in the context of regional needs, overall City Welfare and objective as well as desires of neighbors and the preservation of neighborhood character. This proposal would serve the greater community by improving cell phone coverage in the area while also preserving the neighborhood character by having the least visual impact to the site and no impact to the current use of the property." The City Council placed a number of conditions on its approval, including that "[t]he cell tower shall not exceed 65 feet in height."

C. The Petition for Writ of Mandate and the Preliminary Injunction

On March 12, 2015, appellants filed a petition for writ of mandate and complaint for injunctive and declaratory relief challenging the City's approval of the Project. Verizon started construction on April 22, 2015. Appellants sought a temporary restraining order to halt further construction. Superior Court Judge William Elfving denied the temporary restraining order but issued an order to show cause why a preliminary injunction should not issue. On June 8, 2015, Superior Court Judge Carrie A. Zepeda granted the motion for preliminary injunction, enjoining further construction.

D. The Trial Court's Order Denying the Petition for Writ of Mandate

The parties stipulated to bifurcate appellants' petition for writ of mandate (styled as the first cause of action in the operative complaint) from their declaratory and

injunctive relief claim (the second cause of action in the operative complaint) and to have the writ petition tried first. Following a two-part hearing, Superior Court Judge Socrates P. Manoukian denied the petition for writ of mandate in an order filed on March 9, 2016. Pursuant to the parties' stipulation, that order dissolved the preliminary injunction. Appellants appealed from the order denying the petition for writ of mandate on March 30, 2016 (*Clear Light Ventures, Inc. et al. v. City of Palo Alto et al.* (H043407)).

In October 2016, appellants requested dismissal with prejudice of their second cause of action to allow the court to enter a final judgment. Dismissal was entered as requested and judgment was entered in favor of the City, the City Council, Verizon, and Little League (collectively, respondents) and against appellants on November 30, 2016. Appellants appealed from that judgment on December 21, 2016 (*Clear Light Ventures, Inc. et al. v. City of Palo Alto et al.* (H044284)).

This court ordered appeal numbers H043407 and H044284 considered together for briefing, oral argument, and decision.

II. DISCUSSION

A. Project Consistency with the General Plan

Appellants contend that the Project is not consistent with the City's general plan and that the City's findings to the contrary are unsupported by substantial evidence. For the reasons discussed below, these claims lack merit.

1. Legal Principles and Standard of Review

The Government Code requires every county and city to "adopt a comprehensive, long-term general plan for the physical development of the county or city . . . ." (Gov. Code, § 65300.) A general plan sets forth " 'a " 'charter for future development' " ' " and related policies, which " ' " 'typically reflect a range of competing interests.' " ' " (*Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1562 (*Pfeiffer*).) A city's land use and development decisions must be consistent with its general plan and the policies therein. (*Id.* at pp. 1562-1563.) A " ' " 'project is consistent with the general

plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment.' " ' " (*Id*. at p. 1563.) " '[P]erfect conformity with each and every policy set forth in the applicable plan' " is not required. (*Ibid*.)

We review the City's determination that the Project is consistent with its general plan (not the decision of the trial court) for abuse of discretion. (*Pfeiffer, supra,* 200 Cal.App.4th at p. 1563.) " 'An abuse of discretion is established only if the city council has not proceeded in a manner required by law, its decision is not supported by findings, or the findings are not supported by substantial evidence. (Code Civ. Proc., § 1094.5, subd. (b).)' " (*San Francisco Tomorrow v. City and County of San Francisco* (2014) 228 Cal.App.4th 498, 514.) Evidence is substantial where it is of ponderable legal significance, reasonable in nature, credible, and of solid value. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) "Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

The City's determination is entitled to " 'great deference' " for two reasons. (*Pfeiffer, supra*, 200 Cal.App.4th at p. 1563.) First, as the body that adopted the general plan policies, the City " 'has unique competence to interpret [and apply] those policies . . . .' " (*Ibid*.) Second, the City " 'must be allowed to weigh and balance the plan's [competing] policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes.' " (*Ibid*.) Of course, even deferential review can and should be " '[v]igorous and meaningful,' " "not . . . perfunctory or mechanically superficial." (*Orinda Assn. v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1161-1162 (*Orinda Assn*.), quoting *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 517.) "[T]he party challenging a city's determination of general plan consistency has the burden to show why, based on all of the evidence in the record, the determination was unreasonable." (*Pfeiffer, supra*, at p. 1563.)

2. Consistency with Policy L-12

Appellants challenge the City's finding that the Project is consistent with Policy L-12 of the City's general plan. Policy L-12 provides: "Preserve the character of residential neighborhoods by encouraging new or remodeled structures to be compatible with the neighborhood and adjacent structures." The City found that the Project is consistent with that policy because (1) the cell tower "would not be incompatible with adjacent structures (particularly, the 60 foot tall light poles)"; (2) "cell towers are necessary in one form or another within residential neighborhoods" to ensure adequate cell service; (3) "[t]here are already several existing cell tower facilities in close proximity to the project site within the neighborhood"; and (4) the proposed tower "would have a minimal visual impact to the neighborhood" given the existence of the other ball field lights and the fact that "[t]he addition of 5 feet in height for the new antennas is a very minor change."

These findings are supported by substantial evidence. Record evidence establishes that the cell tower replaces one of four poles used to light the baseball diamond. The existing poles were 60 feet tall and 12 inches in diameter. The cell tower is 65 feet tall, 18 inches in diameter, with a radome concealing cellular antennas on top and ball field lighting at the same height and orientation as the other poles. The City Council conditioned its approval of the Project on the cell tower being "the same color and material as the existing light poles[,] . . . includ[ing] an acid wash treatment to have the new pole look like the existing poles," and "[t]he radome . . . be[ing] painted gray color to match the pole structure." The record also contains evidence that a grove of mature eucalyptus trees adjacent to the baseball diamond would serve as a backdrop for the cell tower when viewed from Middlefield Road. The foregoing is substantial evidence supporting the City's findings that the cell tower would not be incompatible with adjacent structures and would have a minimal visual impact to the neighborhood.

Substantial evidence likewise supports the City's finding that cell towers are necessary within residential neighborhoods to ensure adequate cell service. Verizon submitted a report to the City from one of its radio frequency design engineers documenting the existence of a gap in its "in-building service coverage" in a two-square-mile area encompassing residential neighborhoods, schools, Mitchell Park, and portions of Middlefield Road and Alma Street (Coverage Gap). The report explained that the Coverage Gap exists due to the lack of wireless facilities in the immediate area and the exhaustion of the capacity of the closest wireless facilities (located one to two miles away) due to increased customer usage of the network. The report further explained that the Coverage Gap results in failed call attempts, dropped calls, poor call quality, and slow data speeds for customers in the affected area. The record also contains text messages from 20 Verizon customers in the City to Verizon complaining of dropped calls, data delays, or poor cell phone reception. And it contains emails to City officials from residents complaining of no in-home cell service. The foregoing substantial evidence supports the conclusion that a cell tower is necessary in the Coverage Gap, which is composed largely of residential neighborhoods, to allow for the provision of sufficient cell service. Accordingly, the evidence supports the finding that, more generally, cell towers are necessary within residential neighborhoods to ensure adequate cell service.

An "Alternatives Analysis" that Verizon submitted to the City, which describes other locations that it explored and rejected for the new cell tower, identifies existing cell tower facilities near the Project site. Specifically, the Alternatives Analysis identifies an existing 65-foot tall stealth treepole "located 0.1 miles south of the Proposed Facility [that] hosts another carrier's wireless facility . . . ." The same report identifies an "existing wireless facility [at Fire Station 4] located 0.1 miles north of the Proposed Facility [that] is incorporated into a stealth flagpole." The Alternatives Analysis is substantial evidence supporting the City's finding of the existence of other cell towers near the Project site.

The findings and evidence discussed above support the City's ultimate finding that the Project is consistent with the City's Policy (L-12) of "preserv[ing] the character of residential neighborhoods by encouraging new or remodeled structures to be compatible with the neighborhood and adjacent structures." That is, one reasonably could conclude that a cell tower that replaces an existing light pole, resembles adjacent light poles, and sits 0.1 mile from two other cell towers is "compatible with the neighborhood and adjacent structures" such that it is consistent with the policy of "preserv[ing] the character of residential neighborhoods."

The crux of appellants' objection to the City's finding of consistency with Policy L-12 is their view that the cell tower and equipment enclosure are "commercial" or "industrial" structures that are inherently inconsistent with the residential character of the neighborhood. But they point to no evidence supporting their apparent interpretation of the phrase "residential neighborhoods" in Policy L-12 as meaning geographical areas that are devoid of structures that are not residences. And the record compels us to reject that unduly narrow interpretation. The neighborhood at issue, while designated Single Family Residential on the City's land use map and zoned Single Family Residential (R-1), is home to a fire station, an electrical substation, a school, a church, a library, and two cell towers. The parcel itself houses a snack shack/office building, two dugouts, batting cages, bleachers, storage sheds, and four light poles. At the time the Project was approved, the City's municipal code specifically provided for the placement of "wireless communications facilities" on "residentially zoned parcel[s]." (PAMC, § 18.42.110, subd. (b)(1).) And, as City Staff noted in recommending Project approval, "[l]arge transformers and unattractive utility poles are a common part of the neighborhood fabric." Because residential neighborhoods include non-residential structures, and a number of such structures exist in the immediate vicinity of the Project, appellants' inherent inconsistency argument is not persuasive.

3. Consistency with Other Aspects of the General Plan

Appellants contend that the Project is inconsistent with other aspects of the general plan, including Goal H-1, Goal L-3, Policy L-5, Program L-3, Policy L-3, and Program L-81.[1] Respondents argue that appellants failed to raise these objections during the course of the administrative proceedings, thereby failing to exhaust their administrative remedies. Appellants do not address that argument on reply.

"Exhaustion of administrative remedies is a jurisdictional prerequisite to judicial action to challenge a planning decision." (*Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 993.) "The doctrine of exhaustion of administrative remedies limits the scope of issues subject to judicial review to those that the administrative agency has had the opportunity to consider. [Citation.] Consequently, the issues not raised before the administrative agency are not preserved for review by the courts." (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1130.) "[T]he exact issue, not merely generalized statements, must be raised." (*Monterey Coastkeeper v. State Water Resources Control Bd*. (2018) 28 Cal.App.5th 342, 359.) " ' "The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. [Citation.]" [Citation.]' " (*Ibid*.) Appellants have not met their burden to show that the issue of Project compliance with the specific

[1] Goal H-1 states: "Ensure the preservation of the unique character of the city's residential neighborhoods." Goal L-3 states: "Safe, Attractive Residential Neighborhoods, Each With Its Own Distinct Character and Within Walking Distance of Shopping, Services, Schools, and/or Other Public Gathering Places." Policy L-5 states: "Maintain the scale and character of the City. Avoid land uses that are overwhelming and unacceptable due to their size and scale." Program L-3 states: "Maintain and periodically review height and density limits to discourage single uses that are inappropriate in size and scale to the surrounding uses." (Italics omitted.) Policy L-3 states: "Guide development to respect views of the foothills and East Bay hills from public streets in the developed portions of the City." Program L-81 states: "Encourage the use of compact and well-designed utility elements, such as transformers, switching devices, and backflow preventers. Place these elements in locations that will minimize their visual intrusion."

general plan goals, policies, and programs listed above was raised before the City. Accordingly, the issue is not cognizable on appeal. (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 910.)

Appellants' claim of Project inconsistency with the general plan goals, policies, and programs set forth above fails for a second, independent reason—their contentions are too perfunctory and inadequately developed to merit consideration. Appellants merely assert that the goals, policies, and programs to which they cite are inconsistent with the Project with no factual or legal analysis. "We need not address points in appellate briefs that are unsupported by adequate factual or legal analysis." (*Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com.* (2006) 135 Cal.App.4th 793, 814.)

B. The City Made The Requisite Findings Supporting CUP Approval

PAMC, section 18.76.010, subdivision (c)(2) provides that "[n]either the director, nor the city council on appeal, shall grant a conditional use permit, unless it is found that the granting of the application will . . . [b]e located and conducted in a manner in accord with the Palo Alto Comprehensive Plan and the purposes of this title (Zoning)." Appellants argue that the City failed to find that the Project would be located and conducted in a manner in accord with the purposes of Title 18 of the PAMC. The record refutes that claim.

The purposes of Title 18 are "to promote and protect the public health, safety, peace, morals, comfort, convenience, and general welfare, including the following more particularly specified purposes: [¶] (a) To further, promote, and accomplish the objectives, policies, and programs of the Palo Alto Comprehensive Plan; [¶] (b) To lessen congestion and assure convenience of access; to secure safety from fire, flood, and other dangers; to provide for adequate public health, sanitation, and general welfare; to provide for adequate light, air, sunlight, and environmental amenities; to promote and encourage conservation of scarce resources; to prevent overcrowding of land and undue

concentration of population, to facilitate the creation of a convenient, attractive and harmonious community; to attain a desirable balance of residential and employment opportunities; and to expedite the provision of adequate and essential public services to the community." (PAMC, § 18.01.020.)

Here, the City Council found that "[t]he proposed use will be located and conducted in a manner in accord with the Palo Alto Comprehensive Plan and the purposes of the Zoning Ordinance." The City Council then explained: "Wireless Communication Facilities are allowed with Architectural Review and Conditional Use Permits as detailed in PAMC Section 18.42.110. The telecommunications facility will be located at an existing site developed as a baseball field and will be used in accordance with prescribed conditions of approval. The facility will not pose a health risk and will not interfere with the existing use or other surrounding properties. Verizon will be providing a desirable, upgraded service to Palo-Alto residents and businesses, and the proposed facility will improve service in the coverage area. The proposal is consistent with the City of Palo Alto Comprehensive Plan as detailed in Comprehensive Plan Compliance Table (Attachment C). Most importantly the proposal supports Comprehensive Plan Policy B-13 to support the development of advanced communication infrastructure and Policies L-7 and L-12 to evaluate changes in land use in the context of regional needs, overall City Welfare and objective as well as desires of neighbors and the preservation of neighborhood character. This proposal would serve the greater community by improving cell phone coverage in the area while also preserving the neighborhood character by having the least visual impact to the site and no impact to the current use of the property."[2]

The latter portion of the foregoing explanation expressly addresses the Project's consistency with the Comprehensive Plan. The first portion, while it does not explicitly

[2] There is nothing "perfunctory" or "boilerplate" about these findings, despite appellants' assertion to the contrary.

reference the purposes of the zoning ordinance, addresses the ways in which the Project is consistent with those purposes. For example, that the "facility will not pose a health risk" is in accord with the zoning ordinance's purpose "to promote and protect the public health." (PAMC, § 18.01.020.) And the fact that "the proposed facility will improve service in the coverage area" is consistent with the zoning ordinance's purpose "to promote . . . comfort, convenience, and general welfare." (*Ibid*.) Thus, the City made the requisite findings before granting the CUP.

C. No Variance From the Zoning Height Limit was Required

Appellants maintain that the Project required a variance from the applicable zoning ordinance height limit, which Verizon never sought and the City never approved. Alternatively, they contend that, to the extent such a variance was approved, that approval is invalid for noncompliance with Government Code section 65906. As discussed below, we reject appellants' argument because respondents complied with the requirements of the municipal code, which did not require the issuance of a variance.

1. Respondents Complied With the Municipal Code

At the time the City approved the Project, PAMC, section 18.42.110 governed the placement of wireless communications facilities (WCF), including cell towers, in the City. PAMC, section 18.42.110, subdivision (b), entitled "Review Procedure," provided that "[a] conditional use permit and architectural review are required for: [¶] (1) Projects that are located on a residentially zoned parcel . . . ." PAMC, section 18.42.110, subdivision (c), titled "Development Standards and Exceptions," provided that "[e]ach proposed project shall meet the standard zoning requirements for the zone district in which it is located. The following development exceptions may be considered and approved in conjunction with the required review process: [¶] . . . [¶] (2) Stand alone WCF shall be no taller than 65 feet."

The Project is located on a residentially zoned parcel. In accordance with PAMC, section 18.42.110, subdivision (b), Verizon sought and the City approved a CUP and

architectural review. The cell tower is 65 feet tall, which exceeds the usual height limits for residentially zoned parcels.[3] The City Council conditioned its approval of the Project on "[t]he cell tower . . . not exceed[ing] 65 feet in height." The inclusion of that condition shows that, in accordance with PAMC, section 18.42.110, subdivision (c), the City "considered and approved in conjunction with the required review process" one of the development exceptions PAMC, section 18.42.110, subdivision (c) expressly allows—namely, that "Stand alone WCF shall be no taller than 65 feet."

2. Government Code Section 65906 Does not Apply

Appellants argue that the exceptions authorized by PAMC, section 18.42.110, subdivision (c) are variances, such that compliance with Government Code section 65906 was required. We are not persuaded.

"[A] variance is a permit to build a structure or engage in an activity that would not otherwise be allowed under the zoning ordinance . . . ." (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1007.) "Unlike a conditional use permit, which is governed by the terms of the zoning ordinance, a variance may only be granted based on specific findings that are required by state law." (7 Miller & Starr, Cal. Real Estate (4th ed. 2018) § 21:10.) Specifically, Government Code section 65906 limits the granting of variances "from the terms of the zoning ordinances" to circumstances in which, "because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification."

Here, PAMC, section 18.42.110, which is part of the City's zoning ordinance, expressly allows for the installation of stand-alone wireless communications facilities that

[3] The PAMC limits the height of buildings in residential zones to 30 or 33 feet. (PAMC, § 18.12.040.)

do not exceed 65 feet on residentially zoned parcels. Because such a structure is expressly allowed under the zoning ordinance, it does not require a variance.

As appellants note, such structures may exceed the standard zoning height requirement only with the approval of a "development exception[]." (PAMC, § 18.42.110, subd. (c).) They argue that an "exception" is considered a "variance" under "controlling state law," such that the City was required to make the findings required by Government Code section 65906 for a variance. We disagree.

For their position that, as a matter of state law, any exception constitutes a variance, appellants cite Government Code section 65906, *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168 (*Hollywoodland*), and *Orinda Assn.*, *supra*, 182 Cal.App.3d 1145. Of those authorities, only *Hollywoodland* even uses the term "exception." At issue there was an exception to the City's specific plan, which the court did analogize to a variance. (*Hollywoodland*, *supra*, at p. 1183.) But *Hollywoodland* does not convince us that an exception under PAMC, section 18.42.110, subdivision (c) constitutes a variance subject to Government Code section 65906, for three reasons.

First, *Hollywoodland* did not hold that exceptions and variances are synonymous in all circumstances. Instead, the court appropriately analogized between the two because the applicable municipal code imposed limitations on the granting of specific plan exceptions that mirrored the limitations Government Code section 65906 places on the granting of variances. *(Cf. Hollywoodland*, *supra*, 161 Cal.App.4th at p. 1182 [municipal code required city to find, before granting exception, that " 'the strict application of the regulations of the specific plan to the subject property would result in practical difficulties or unnecessary hardships inconsistent with the general purpose and intent of the specific plan' " and that " 'there are exceptional circumstances or conditions applicable to the subject property involved or to the intended use or development of the subject property that do not apply generally to other property in the specific plan area' "]

with Gov. Code, § 65906 ["Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, . . . the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification"].) The PAMC imposes no similar limitations on the granting of the development exceptions specified in PAMC, section 18.42.110, subdivision (c).

Second, *Hollywoodland* is not binding on this court. (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2016) 4 Cal.App.5th 103, 117 fn. 10 [" 'We are not bound by the opinion of another intermediate appellate court' "].)

Third, the PAMC distinguishes between the terms "exception" and "variance," rather than using them interchangeably. (See PAMC, § 18.76.040 [providing for "neighborhood preservation exception[s]" to development standards in neighborhood preservation combining districts]; *id*., § 18.10.140, subd. (c)(1) [" It is not necessary for the property owner to obtain a variance" to obtain a neighborhood preservation exception as set forth in section 18.76.040]; § 18.76.030 [governing variances].)

D. Lack of Fair Hearing and Due Process Claims

Finally, appellants contend the City Council denied them their Code of Civil Procedure section 1094.5, subdivision (b)[4] right to a fair hearing and their due process rights by approving the Project on its consent calendar without a public hearing. They claim they were entitled to a de novo hearing before the City Council. These claims have not been preserved for appellate review and, in any event, fail on the merits.

1. Appellants Failed to Preserve These Claims for Appellate Review

Failure to timely assert a right, including a constitutional right, generally results in forfeiture in both civil and criminal cases. (*Keener v. Jeld-Wen, Inc*. (2009) 46 Cal.4th

[4] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

247, 264.) The forfeiture rule, which "is designed to advance efficiency and deter gamesmanship," "generally applies in all civil and criminal proceedings." (*Ibid*.) "Application of the forfeiture doctrine is . . . appropriate in the context of an appeal taken from an order granting or denying a writ petition." (*M.N. v. Morgan Hill Unified School Dist.* (2018) 20 Cal.App.5th 607, 632.)

Here, appellants' writ petition asserted that "Respondents failed to provide due process or fair hearing by refusing to consider the merits of appellants' appeal to the City Council de novo . . . ." But in their opening trial brief, appellants abandoned that claim. Appellants summarized their first amended petition and complaint as raising four grounds for relief: (1) Project inconsistency with the city's general plan, (2) inadequate findings in support of the Project approvals, (3) lack of substantial evidence supporting those findings, and (4) failure to provide adequate and impartial public review in violation of appellants' due process rights. They then expressly limited their opening trial brief to the first three claims. Appellants' counsel did not mention due process or the section 1094.5, subdivision (b) requirement of a fair hearing during the hearing on the writ petition, which spanned two days. Nor did appellants argue that the lack of a de novo hearing before the City Council denied them a fair hearing or violated due process in their post-trial brief and summation. Appellants having not pressed for rulings on those issues, the court made none. Appellants forfeited their fair hearing and due process claims by failing to pursue them below.

2. Appellants' Claims are Insufficiently Developed

Appellants' fair hearing and due process claims fail for the additional reason that they are "perfunctorily asserted without legal development," such that "[w]e may properly disregard" them. (*Cameron v. Sacramento County Employees' Retirement System* (2016) 4 Cal.App.5th 1266, 1282 [on appeal from denial of petition for a writ of administrative mandate].) Appellants fail to distinguish between—and separately analyze—the fair hearing requirement of section 1094.5 and constitutional due process,

though the two "are not synonymous." (*Pinheiro v. Civil Service Com. for County of Fresno* (2016) 245 Cal.App.4th 1458, 1463 (*Pinheiro*); *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1178 (*Clark*) [finding City "violated state law by failing to provide a fair hearing . . . [but] did not offend the federal Constitution, on either procedural or substantive due process grounds"].) And while appellants cite numerous cases (some without pinpoint cites), they do not explain how those authorities support their claims. (*In re S.C.* (2006) 138 Cal.App.4th 396, 411-412 [case citations with "no jump cites to the pages of those cases where pertinent holdings purportedly exist" are "unhelpful," as are "string citations [where] appellant's counsel makes no effort to explain how the authorities support her claim of error"]; *id.* at p. 412 ["it is not the role of an appellate court to carry appellate counsel's burden"].)

3. The Lack of Fair Hearing Claim Lacks Merit

Even apart from the shortcomings described above, appellants' claims fail on the merits. Section 1094.5, subdivision (b) authorizes the issuance of a writ of administrative mandate where the agency deprived the petitioner of a fair hearing. (*Clark*, *supra*, 48 Cal.App.4th at p. 1169.) The right to a fair hearing is violated where, for example, the agency relies on evidence outside the record in reaching its decision (*Pinheiro*, *supra*, 245 Cal.App.4th at p. 1467, citing cases) or lacks impartiality (*Clark*, *supra*, at p. 1173). Whether the petitioner received a fair hearing is a question of law reviewed on appeal de novo. (*Id.* at p. 1169.)

Generally, "a hearing before a city council on an application for a [conditional use permit] after hearing by a planning commission is a proceeding de novo." (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1221.) However, "[t]here are exceptions to this rule." (*Id.* at p. 1221, fn. 10.) For example, where "a local ordinance . . . provide[s] for a different standard of review," the general rule of de novo review does not apply. (*Ibid.*) That is precisely the situation here.

Chapter 18.78 of the Palo Alto Municipal Code governs appeals from determinations of the Director. Section 18.78.030 requires the Planning and Transportation Commission to "review the appeal at a public meeting and issue a recommendation to the city council to uphold, overturn, or modify the action or determination of the director" "[w]ithin thirty days of the filing of a timely appeal from a director's determination . . . ." Section 18.78.040, subdivision (a) provides that "[t]he recommendation of the planning and transportation commission on the application shall be placed on the consent calendar of the city council within thirty days. The city council may: [¶] (1) Adopt the recommendation of the planning and transportation commission; or [¶] (2) Remove the appeal from the consent calendar, which shall require three votes, and take action to uphold, overturn, or modify the action or determination of the director."

Here, the City complied with the requirements of Chapter 18.78. The City's Planning and Transportation Commission held a public hearing, after which it voted to recommend that the City Council approve the CUP application. The recommendation was placed on the City Council's consent calendar and the City Council adopted the recommendation. Two additional public hearings regarding the Project took place before the Architectural Review Board. Under these circumstances, where there were numerous public hearings and the City complied with its municipal code, we discern no violation of the state law fair hearing requirement.

4. The Due Process Claim Lacks Merit

" 'The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in "property" or "liberty." [Citations.] Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process.' " (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 214.) Appellants do not claim, let alone show, that they have been deprived of a protected property or liberty interest. Even assuming the

existence of such an interest, "the precise dictates of due process are flexible and vary according to context." (*Id*. at p. 212.) Appellants cite no authority for their position that due process requires a de novo hearing before the City Council on an appeal from the grant of a CUP where there have been other public hearings and the applicable municipal code requires no such hearing.

III. DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

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ELIA, J.

WE CONCUR:

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GREENWOOD, P. J.

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GROVER, J.

Clear Light Ventures, Inc. et al. v. City of Palo Alto et al.
H043407, H044284